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A Glossy Colour Brochure Divides the High Court

Real estate agents commonly prepare brochures as part of the real estate marketing process. For this purpose, information may be supplied by the seller of the real estate or other third parties. The High Court's decision in *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60 involves issues that may be of concern to any person induced to buy real estate by statements in sales brochures. The first issue is the extent to which corporate real estate agents unwittingly engage in misleading or deceptive conduct under s 52 of the *Trade Practices Act 1974* (Cth) ('the Act') where a sales brochure (or other advertising material) contains untrue or misleading statements, supplied by third parties. A further issue is the extent to which agents may be able to escape this potential liability by relying on disclaimers contained in the advertising material.

The Facts

Lachlan Elder Realty Pty Ltd, a real estate agency ('the agent'), prepared and handed to Mr Butcher and Ms Radford ('the purchasers') a promotional brochure concerning the sale of a residential waterfront property, which the purchasers later bought at auction. The brochure contained a reproduction of a survey diagram, which consisted of land held under freehold and land held under a permissive occupancy granted by a government department. The survey diagram emanated from a survey report which the seller of the property had provided to his solicitors for inclusion in a draft contract of sale. The agent took its reproduction of the diagram from this survey report.

The survey diagram purported to depict a swimming pool as lying wholly within the freehold of the property. This was incorrect. In fact, the freehold boundary of the property (as delineated by the mean high water mark) traversed the swimming pool so that the swimming pool lay partly within the freehold and partly within the permissive occupancy. The purchasers claimed that they intended to relocate the swimming pool; the agent was aware of this intention before the auction; they had purchased the property relying on the survey diagram in the brochure and they would not have bought the property if they had known that the swimming pool was not entirely within the freehold.

The Issue

The issue was whether, by distributing the brochure which did not correctly identify the boundary of the property, the agent's conduct constituted misleading or deceptive conduct or conduct that was likely to mislead or deceive in contravention of s 52 of the Act. To determine this issue it was also necessary to consider the operation of certain exclusion clauses. The exclusion clause of relevance to the agent provided:

All information contained herein is gathered from sources we believe to be reliable. However we cannot guarantee it's [sic] accuracy and interested persons should rely on their own inquiries.

Division in the High Court

By a 3-2 majority, the High Court held that the agent did not engage in conduct in contravention of s 52 of the Act.

The Majority Joint Judgment (Gleeson CJ, Hayne and Heydon JJ)

The majority affirmed the principles discussed in *Yorke v Lucas* (1985) 158 CLR 661, in relation to a party who acts as a conduit of information. In *Yorke v Lucas*, Mason ACJ, Wilson, Deane and Dawson JJ noted (at 666) that a corporation could contravene s 52 even though acting honestly and reasonably:

That does not, however, mean that a corporation which purports to do no more than pass on information supplied by another must nevertheless be engaging in misleading or deceptive conduct if the information turns out to be false. If the circumstances are such as to make it apparent that the corporation is not the source of the information and that it expressly or impliedly disclaims any belief in its truth or falsity, merely passing it on for what it is worth, we very much doubt that the corporation can properly be said to be itself engaging in conduct that is misleading or deceptive.

In applying these principles, the majority considered that it was important that the agent's conduct be viewed as a whole. On this basis, the agent did not engage in conduct that was misleading. The agent did no more than communicate what the vendor was representing, without adopting it or endorsing it. The majority's conclusion flowed from the nature of the parties, the character of the transaction contemplated, and the contents of the brochure itself.

The nature of the parties

The purchasers were persons who were quite wealthy, intelligent, shrewd and self-reliant dealing with a suburban real estate agent. The majority noted that suburban real estate agents do not hold themselves out as possessing research skills or the means of independently verifying title details about properties they seek to sell.

The character of the transaction

The transaction was the purchase of a very expensive investment property (\$1.36 million). The purchasers engaged appropriate professional advisers to assist them, namely an accountant, an architectural designer and building consultant, a licensed builder and they also engaged solicitors to assist with the process of making and completing the contract.

The contents of the brochure

The majority accepted the findings of the trial judge that potential purchasers would be likely to assume that the survey diagram, forming part of the brochure, had been taken from an identification survey report. It was plain that the diagram had not been made by the agent, and the circumstances

negated any suggestion that the agent had adopted the survey diagram as its own, or that the agent had verified its accuracy.

What was the effect of the disclaimers? Although not noticed by the purchasers, according to the majority the disclaimers were there to be read. Although in small type, only persons of very poor eyesight would find them illegible. The majority noted that a reasonable purchaser would have read the entire brochure. According to the majority, read as a whole, the brochure meant:

The diagram records what a particular surveyor found on a survey in 1980. We are not surveyors. We did not do the survey. We did not engage any surveyor to do the survey. We believe the vendor and the surveyor are reliable, but we cannot guarantee the accuracy of the information they have provided. Whatever you rely on, you must rely on your own inquiries

For this reason, the majority concluded (at [51]):

Hence it would have been plain to a reasonable purchaser that the agent was not the source of the information which was said to be misleading. The agent did not purport to do anything more than pass on information supplied by another or others. It both expressly and implicitly disclaimed any belief in the truth or falsity of that information. It did no more than state a belief in the reliability of the sources.

McHugh J (dissenting)

Unlike the majority, McHugh J considered the agent's conduct was in breach of s 52. McHugh J placed considerable reliance on the fact that the brochure failed to identify the author of the survey diagram and, also, the agent's conduct at a subsequent physical inspection of the property where everything said on behalf of the agent was premised on the pool being within the boundary of the freehold land:

Lachlan Elder not only distributed a brochure containing an inaccurate survey diagram but at the inspection it did nothing to correct the misapprehension under which the purchasers laboured. (at [139]).

Lachlan Elder put out a brochure containing an incorrect survey diagram in a context that suggested that it had adopted the survey diagram as its own. It knew of the purchasers' intention to relocate the swimming pool. It knew that its subsequent conduct in continuing to "endorse" the brochure was likely to induce the purchasers to buy the property because they believed that they would be able to move the pool to a location within the freehold boundary. Its conduct led the purchasers into error and was, therefore, conduct that was misleading or deceptive. (at [140]).

McHugh J did not consider that the disclaimer was effective to obliterate the effect of the misleading or deceptive conduct. In reaching this conclusion, McHugh J noted the accepted line of Federal court authority to the effect that disclaimer clauses do not have independent force of their own. A disclaimer clause will only be effective if it actually modifies the impugned conduct such that the conduct as a whole may be seen as not misleading. Further, the case law suggested that disclaimers that appear in small print at the foot of marketing brochures are rarely effective to prevent conduct from being found to be misleading or deceptive or likely to mislead or deceive.

Finally, McHugh J noted the consumer protection objects of the Act and the public policy implications where disclaimers were effective to deny a statutory remedy for offending conduct.

Kirby J (dissenting)

In a very strong dissent, Kirby J opined that the circumstances revealed a clear contravention of s 52. The construction of s 52, adopted in the majority judgment, was unduly narrow. Tiny printed disclaimers and factual inferences were not sufficient to deprive the purchasers of a statutory remedy:

It is inappropriate for this Court to send a signal to the industry of corporate real estate agents, and other industries, that they can avoid the requirements of the Act by the simple expedient of publishing disclaimers illegible to many eyes and easily overlooked. (at [175])

In Kirby J's view, the arguments that found favour with the majority were not convincing. First, the agent was not simply passing on the seller's information or passing on information 'for what it was worth'. The location of the boundary line would be of importance to any purchaser and was known to be of special importance to the purchasers. Having chosen to include the survey diagram in the brochure, and acting in accordance with the accuracy of that diagram subsequently, the agent was obliged to accept the legal consequences of the diagram being incorrect.

Secondly, the personal characteristics of the purchasers were irrelevant. The Act is of general application. Protection is not denied under the Act simply because the applicant may be characterised as an 'investor' or 'shrewd' or 'intelligent'.

Thirdly, Kirby J accepted that land title may give rise to complex questions requiring independent specialist advice. However, this consideration was extraneous to the issue of whether a corporation, dealing with the purchaser, had breached the anterior and separate legal obligation imposed by s 52.

Fourthly, it was not a proper characterisation of the agent's brochure to suggest that the agent was not the source of the information or was merely passing the information on 'for what it is worth':

The appearance, impression, character and object of the document deny any suggestion that it was someone else's document. It was the agent's production. Save in the one critical particular, it was a professional job, intended to perform the agent's function as such. For its contents, the Act required the agent, as a corporation, to accept responsibility for any misleading or deceptive conduct. (at [196]).

The written disclaimers

In determining that the written disclaimers were ineffective, Kirby J noted that the disclaimers appeared in a smaller typeface than used elsewhere in the brochure. Viewed in context, the smaller typeface may have suggested that

the information was insignificant. In eschewing the majority's treatment of this issue, Kirby J opined:

By holding that the printed disclaimer in this pamphlet was effective to exclude liability under the Act, this Court, in my respectful view, strikes a blow at the Act's intended operation. Henceforth, in effect, the Act may not operate to protect the ordinary recipient of the representations of corporations engaged in trade or commerce. Many such corporations will be encouraged by this decision to believe that they can avoid the burdens of the Act by the simple expedient of tucking away in an obscure place in minuscule typeface a disclaimer such as now proves effective. This approach is contrary to the language and purpose of the Parliament. (at [211]).

Kirby J also noted the trend of intermediate court authority which generally has set its face against contractual exemptions. Kirby J noted further that this approach was justified by expert commentators on grounds of both legal principle and policy. In short, the finer the 'fine print', the more readily a conclusion will be drawn that the provision is not an effective exemption for lack of sufficient notice. On this basis, Kirby J considered that the decision (of the majority):

rewards illegible disclaimers and promises that, in the future, documents including them stand a real chance of avoiding the operation of the Act. With all respect, that is not the message that I believe this Court should give to real estate agents or any other corporate group. It is contrary to the purposes of the Act. (at [215]).

Observations

The split decision in *Butcher v Lachlan Elder Realty Pty Ltd* evidences considerable judicial division concerning factual inferences that may legitimately be drawn from the context in which a s 52 claim arises. Notwithstanding this division, all members of the High Court accepted that if a corporate real estate agent acts as a 'conduit' of erroneous information supplied by a third party, the agent may not necessarily be liable under s 52 of the Act. The mere fact that erroneous information is supplied does not warrant an immediate conclusion that the agent has engaged in misleading or deceptive conduct or conduct that is likely to mislead or deceive. The agent's conduct will be viewed, and assessed, as a whole (rather than in isolation), according to its effect or likely effect or impact on the person to whom it is directed. The determination is an objective one for the court. The court will make this determination by reference to the alleged conduct in the light of the relevant surrounding facts and circumstances.

As demonstrated by this decision, there is scope for an agent to avoid potential liability under s 52 by use of an appropriate disclaimer. If a disclaimer clause has the effect of erasing whatever is misleading or deceptive in the conduct, the clause will be effective, not by any independent force of its own, but by actually modifying the conduct. The real difficulty arises in determining when a disclaimer will effectively modify conduct. The dissenting judgments of McHugh and Kirby JJ both emphasise the primacy that should be attached to the Act as remedial legislation enacted to protect consumers and regulate corporate conduct as a matter of public policy. Given the disagreement between members of the High Court on this issue, any

observations must be necessarily circumspect. To this extent, the observations that follow are intended to be consistent with prudent corporate conduct and may, for this reason, extend beyond the conclusions that would strictly flow from the majority judgment, if viewed in isolation.

The agent as a conduit

- If any information is supplied to an agent, by a third party, to be made available to a potential purchaser, the source of the information should be clearly attributed in the agent's document so any potential purchaser is aware of the true author of the information supplied;
- where a document is supplied by a third party, a copy of the whole document should be supplied to all potential purchasers. The copy should be supplied either separate to the agent's document or as an annexure to the agent's document, rather than being incorporated directly with the agent's own material. If it is not possible, or administratively convenient, to supply all potential purchasers with a fully copy of this information, it should be clearly indicated that this full information will be supplied on request;
- where information is supplied by a third party, in addition to stating the source of the information, the agent should consider the use of a disclaimer expressly stating that the accuracy of the information can not be guaranteed, stating that the agent claims no relevant expertise in the information supplied (if this is the case), advising the potential purchaser to undertake its own inquiries and expressly stating words to the effect that the information is merely supplied or passed on 'for what it is worth' without connoting any belief in either its truth or falsity and that the agent disclaims any responsibility for what is conveyed.

Size, location and wording of a disclaimer

- Any disclaimer provision should be of equal prominence, both by way of typeface and location, as other significant details appearing in the agent's document;
- the appearance of a disclaimer, when viewed in context, should not be suggestive of insignificant information. The use of a bold heading such as '**Important Information**' may counter any such suggestion;
- a disclaimer should be clear and emphatic so that in the words of Kirby J it will 'reasonably...impinge on the consciousness of persons who thereby lose protections enacted by the Parliament for their benefit.' (at [213]).

The relevance of an agent's actual or stated expertise and the nature of the information supplied

- It will be difficult for an agent to successfully disclaim liability for information supplied that falls (as a matter of common experience) within a real estate agent's area of expertise, or falls within the agent's area of claimed expertise. As a corollary, an express disclaimer is more likely to be effective where the information supplied would not otherwise be considered to be within an agent's area of expertise;
- It will be difficult to successfully disclaim liability for 'hard physical facts' that directly impact on the value of the real estate in question (such as the net lettable area of a commercial building) rather than matters of conjecture, or matters in relation to which it would be normally necessary to seek independent expert advice.

Other conduct

- Notwithstanding that a document contains a prominent disclosure, if it is apparent to an agent that a potential purchaser is relying on the accuracy of information contained in the agent's document, an annexure or any other document supplied by the agent, the agent should advise the potential purchaser of the need to make further independent inquiries.